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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN EDWARD HOOPER,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT
AND
ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner was denied his rights of confrontation as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution by the ruling of the Trial Court preventing the Petitioner from cross examining the State's witnesses, Stephanie Milam and Michelle Lucas to determine whether the fact that they had been victims of sexual abuse would bias their testimony against the Appellant who was charged with rape in the alleged sexual abuse of his daughter.

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Petitioner, John Edward Hooper, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court and the

Alabama Court of Criminal Appeals, whereby substantial constitutional issues by Petitioner were not answered by either of the said courts, even though timely raised.

OPINION BELOW

The ruling by the Alabama Court of Criminal Appeals as to the original appeal filed on January 30, 1990 (Third Division, Number 91) is set forth infra in Appendix 1a.

The ruling by the Alabama Supreme Court reversing the decision of the Alabama Court of Criminal Appeals and affirming the Circuit Court of Escambia County, Alabama on December 14, 1990, is set forth infra in Appendix 1b.

The denial of Petitioner's Application for Rehearing by the Alabama Supreme Court on February 8, 1991, is set forth infra in Appendix 1c.

The order by the Supreme Court of the United States on June 24, 1991, denying Petitioner's Petition for Writ of Certiorari on issues other than those raised in this petition is set forth infra in Appendix 1d.

The opinion by the Alabama Court of Criminal Appeals on March 29, 1991, addressing those issues raised in Petitioner's initial brief, but not addressed in its opinion of January 30, 1990, including the issue made the basis of this petition is set forth infra in Appendix 1e.

The order by the Alabama Court of Criminal Appeals overruling and denying Petitioner's Application for Rehearing on May 17, 1991, is set forth infra in Appendix 1f.

The denial by the Supreme Court of Alabama of Petitioner's Writ of

Certiorari on August 23, 1991, is set forth infra in Appendix lg.

JURISDICTION

The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(3) in that the rulings by the Alabama Court of Criminal Appeals and the Alabama Supreme Court denied him the right of confrontation of witnesses guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution; hence Petitioner's Application to this Honorable Court to review the orders of the Appellate Courts of the State of Alabama in this cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth and Fourtheenth Amendments of the United States Constitution.

The Sixth Amendement of the United

States Constitution provides, in part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

The Fourteenth Amendment of the United States Constitution, in pertinent parts, provides as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state ... deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

Petitioner, a former State Trooper, was indicted in a two count Indictment by the Spring Term of the Escambia County Grand Jury in 1985. He was duly arraigned on July 12, 1985, and entered

a plea of not guilty.

Petitoner was first tried and convicted on September 17, 1985. This conviction was appealed to the Alabama Court of Criminal Appeals. On October 28, 1986, that court reversed and remanded Petitioner's conviction because of improper cross-examination of character witnesses by the Honorable Don Valeska, Assistant Attorney General.

On September 16, 1988, the Petitioner was again tried by jury and convicted of two counts of second degree rape. At that time, sentence was deferred and on November 2, 1988, the Honorable Bradley E. Byrne announced judgment of sentence on Petitioner as follows:

> Accordingly, I sentence you pursuant to the split sentence statute to 5 years in the State Penitentiary on your conviction under Count I, and I sentence you pursuant to the split sentence statute to 5 years on your conviction on Count 2; 5 years, that will be 5

years in the State Penitentiary. These sentences are to run concurrently.

Now, I would be unrealistic if I did not expect this case to be appealed based upon the way this case progressed and some very novel issues that were raised at trial that this Court had to deal with, therefore, I am not going to make a determination at this time as to how this sentence should be split, or make a determination as to probation. I am going to reserve all of those questions, all of those issues for determination at a later time once this case has been looked at by the appellate courts of this state, and if it is affirmed then I will make a determination or if no appeal is taken then I will make a determination at that time as to how this sentence should be served, whether probation should be granted, and exactly how this sentence should be split.

You will also be required to pay court costs in these cases and the sum of $250.00 to the Crime Victim's Compensation Assessment.

On December 6, 1988, Petitioner filed a Motion for Judgment of Acquittal and Motion for New Trial. Both motions were subsequently overruled and denied by the Trial Court on January 23, 1989.

At the time of sentencing on November 2, 1988, Petitioner gave oral notice of appeal and subsequently on January 30, 1989, filed further written Notice of Appeal in the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals released an opinion on March 30, 1990 reversing Petitioner's conviction and remanding the case back with an order to the Trial Court to enter a judgment of acquittal for the Petitioner. The State filed an Application for Rehearing on April 16, 1990, which was denied on May 11, 1990.

Thereafter, on May 25, 1990, the State petitioned the Alabama Supreme Court for a writ of certiorari to the Alabama Court of Criminal Appeals. The Alabama Supreme Court granted the writ of certiorari on August 27, 1990. On December 14, 1990, the Alabama Supreme

Court issued an opinion reversing the Court of Criminal Appeals.

Petitioner subsequently filed an Application for Rehearing in the Alabama Supreme Court which was denied on February 8, 1991. The Petitioner thereafter petitioned the United States Supreme Court for a writ of certiorari on the question of "whether the Alabama Supreme Court can alter a rule of evidence and apply the ruling retroactively to supply the necessary evidence to convict the Petitioner without transgressing the prohibition against ex post facto laws contained in Article I of the United States Constitution or the due process clause contained in the Fifth and Fourteenth Amendments to the United States Constitution." On June 24. 1991, the Supreme Court of the United States

denied this petition without opinion.

In the interim, the Alabama Court of Criminal Appeals issued a second opinion addressing those seven issues earlier raised by the Petitioner, but affirming the Petitioner's conviction on March 29, 1991. The Court of Criminal Appeals likewise overruled and denied Petitioner's Application for Rehearing on May 17, 1991.

The Petititoner filed a petition for writ of certiorari in the Alabama Supreme Court on those issued contained in the Court of Criminal Appeals' opinion of March 29, 1991. The Supreme Court of Alabama denied this petition on August 23, 1991.

Hence, this Petition for Writ of Certiorari.

The Petitioner was tried by a jury on two charges of Second Degree Rape, in

the Circuit Court of Escambia County, The Honorable Bradley E. Byrne, presiding, during the week of September 12-16, 1988. On September 6, 1988, a pre-trial hearing was held in which the State called Josephine Bahm to establish that Kimberly Hooper, the prosecuting witness, was recanting her rape allegations against her father, the Petitioner.

A jury was struck on September 12, 1988 and the trial began on September 14. The first witness, Kimberly Hooper, called as the Court's witness, denied on direct examination by the Court, the charges contained in the indictment. From pages R-124-125 of the transcript:

> Q. (THE COURT): Did John Edward Hooper engage in sexual intercourse with you on or about September 7, 1984.
>
> A. No, sir.
>
> Q. Did John Edward Hooper engage in

sexual intercourse with you on or about December 13, 1984?

A. No, sir. (R-124-125).

The Court then permitted the State to cross-examine the witness. Assistant Attorney General Don Valeska cross-examined Kimberly Hooper primarily by impeaching her with inconsistent testimony she had given at Appellant's first trial. In the course of this cross-examination, Kimberly, in her prior testimony, accused her father, the Petitioner, of raping her on the dates in question (R-131-132).

Also, Ms. Hooper identified three pornographic tapes offered by the State for identification purposes as State's Exhibits 1A, 2A and 3A. She testified that she had viewed these tapes at her home by herself. However, the State impeached her with her prior testimony

in which she stated that the Appellant had forced her to view them with him after which they usually had sexual intercourse (R-150-151).

Kimberly testified that she told two of her friends at school that her father had been sexually abusing her. These were Tyra Thomley and Michelle Lucas (R-178-179). She was then impeached with her prior testimony wherein she stated that she had also told Stephanie Milam and Ms. Carol Middleton, a school counselor. ~~Ms.~~ Hooper was also questioned concerning an incident at her house involving Stephanie Milam. From page R-201 of the record:

> Q. Did you ever at anytime prior to September 16, 1985, when you testified right here, did you ever watch those films with Stephanie Milam and your father at your house in Atmore, Alabama?
>
> A. No, sir.
>
> Q. At anytime ever?

A. Stephanie has never been in my house.

and on page R-202:

Q. -- did you ever have an occasion to watch on the satellite dish with Stephanie Milam and your father X-rated pornographic TV shows?

MR. HARDEN: Judge, if it please the Court, we object and move for a mistrial on the grounds that's totally irrelevant, and has nothing to do with the charges in this case.

MR. VALESKA: I submit to the court that it does.

THE COURT: I overrule the objection.

MR. HARDEN: Except.

MR. OWENS: Except.

A. No, sir.

On cross-examination by the Petitioner, Kimberly Hooper again denied that her father had raped her. According to Kimberly, she told two of her friends that her father had raped her because she did not like them telling her how lucky she was to have a

father who was a state trooper. She further stated that she had attempted to recant her story prior to the first trial but had been threatened not to do so. From page 208 of the record:

> Q. And is it a matter of fact, Kimberly, that back there in the back rooms of this courthouse just before the trial of your father on September 25th that one Amelia Davis threatened you with jail if you didn't come out here and testify against your father?
>
> A. Yes, sir. And also Mr. Rebarchek from the Attorney General's office, Miss Kathy Hill and Mr. Doug Mitchell.
>
> Q. Tell us what Miss Kathy Hill told you back there just before the trial?
>
> A. That if I did not the way that they wanted me to they could have me charged with perjury. (R-208).

and on pages (R-210-211):

> Q. Okay. And what other threats or coercion, if there were any, did you receive before your father's trial in September of 1985?
>
> A. Let's see. In July I called a Sergeant Morris and a Lieutenant Evans, they are both state troopers, and told them it was not true and I had been lying, and that Mrs. Davis and Mr. Mitchell called me and told

me that they could send a sheriff's deputy or someone to come get me and take me to jail. Then Mrs. Davis told me that if I would agree to go to Gulf Coast Hospital and could prove to the people that I was telling the truth when I said it didn't happen then I could go home and they would drop the case. And we had to go to court to get that arranged,. And Judge Crow said that I had to go. And then afterwards she told me that if I wanted to get out of Gulf Coast Hospital that I had better say it happened or she could make -- she could, how would you say it, she could make sure that I would stay there.

Kimberly also testified, at page 209 of the transcript, that she had been threatened with perjury charges before her present testimony.

Q. MR. HARDEN: Have you been told by anyone that you could be charged with perjury today, please, ma'am?

A. Yes, sir.

Q. And who told you that?

A. Mr. Higgins.

Q. Who is Mr. Higgins?

A. I believe an investigator for the Attorney General's office.

Q. Is that Mr. Higgins sitting on the

front row right there from the Attorney General's office?

A. Yes, sir.

Q. Did he tell you that if you came in this courtroom today that you would be charged with perjury?

A. He told me that my testimony would be perjury because I said a different story in the first trial.

Q. Okay. Do you know what perjury is, Kimberly?

A. Not exactly, sir.

Q. Do you know you can go to jail for it though?

A. Yes, sir. (R-209).

Ms. Hooper identified a Rusty Miller as the only person with whom she had ever had sexual intercourse. She denied the Petitioner had ever abused or threatened her (R-215).

The State opened its case by calling Mr. Donald Champion. Mr. Champion identified State's Exhibits 1A, 2A and 3A as three pornographic tapes that he

had loaned Petitioner around March of 1984. However, on cross-examination, Mr. Champion admitted that he was not certain that State's Exhibits 1A, 2A and 3A were the tapes that he had loaned the Petitioner.

Next, Captain L. N. Hagan testified that, in the course of his duties for the Alabama Bureau of Investigation, he had investigated the rape complaints made by Kimberly Hooper and that the only person she named as having had sexual intercourse with was her father, the Petitioner. Captain Hagan identified State's Exhibits 1A, 2A and 3A as the three tapes, he, Doug Mitchell, Ameila Davis and Bill Rhegness had determined that Kimberly Hooper had watched based on her statements to Mrs. Davis (R-265). Captain Hagan described, over the Petitioner's objection that a

proper predicate had not been laid, the contents of the tapes (R-268-271).

The State called Stephanie Milam, Tyra Thomley, Michelle Lucas and Carol Middleton to testify that Kimberly Hooper had made complaints to them that her father had raped her. Ms. Middleton stated that she reported the abuse to the Department of Human Resources. Stephanie Milam further testified that Mr. Hooper had forced her to watch an X-rated tape with him and his daughter. From page 318 of the record:

> Q. Have you ever watched sexually explicit television programming in Kimberly's house?
>
> A. Once.
>
> Q. Was the defendant present? Was Mr. Hooper present?
>
> A. Yes.

and on page R-321:

> Q. (MRS. POE): Did you while watching sexually -- did you watch sexually explicit

programing in Kimberly's home?

A. Yes.

Q. Was Mr. Hooper present at that time?

MR. HARDEN: Object, it's repetitious.

THE COURT: I overrule.

MR. HARDEN: Except.

Q. (MRS. POE): You may answer.

A. Yes.

Q. Did you attempt to leave?

A. Yes.

Q. Did any one say anything? Did he say anything to you?

MR. HARDEN: Object to who "he" is. It's not clear.

Q. (MRS. POE): Mr. Hooper. Did Mr. Hooper say anything to you at that point?

A. Yes.

Q. What did Mr. Hooper say to you?

A. Don't go, don't leave, stay, you know.

She also contradicted Ms. Hooper concerning their friendship. From page

R-310 of the record.

Q. How did you know Kimberly?

A. We were best friends.

Q. Did you all do things together?

A. Yes, we did.

Q. Could you tell the jury what kind of things you did together?

A. We spent the night with each other. We rode the bus. We had classes together. We did practically everything together.

Rusty Miller testified and denied that he had ever had sexual intercourse with Kimberly Hooper or that he had ever even been at her house (R-363).

During the cross-examination of Stephanie Milam, the Petitioner attempted to determine whether or not Ms. Milam had ever been a victim of sexual abuse (R-326):

Q. You was molested?
MRS. POE: Objection, Your Honor.

MR. HARDEN: She opened the door on it, Judge.

THE COURT: What are your grounds?

MRS. POE: The question as whether this witness had ever been molested is irrelevant as to whether or not Kimberly Sue Hooper was ever molested.

THE JUDGE: I sustain the objection as to what the content of the dream was. I don't think that's a issue.

Later, while Michelle Lucas was being examined, the Petitioner made an offer of proof to show that both Stephanie Milam and Michelle Lucas had previously been sexually abused.

We think that the jury is entitled to know, that is to show, really, the motive. We offer it to show motive as to why the witnessin this case against this defendant John Hooper would give statements to these little girls to the effect that her father also did that to her. We would show it as compassion to console these two witnesses; Milam and Lucas.

We also offer to prove that we think we are allowed to prove it, to show bias, interest and prejudice against this man, John Hooper by these witnesses; Milam and Lucas.

I think we are entitled to have a thorough and sifting cross-examination insofar as it pertains to their being the prosecutrix in the past.

Judge Byrne denied this offer of proof because he did not feel that the evidence that would be elicited would be sufficient to show bias.

> THE COURT: I am assuming that what you are saying is correct, if she would testify to that, and even so it is my opinio that that would not be sufficient to show a bias towards this defendant.

Dr. Jimmy Adkisson testified and was offered as an expert witness. Dr. Adkisson stated that Kimberly Hooper's introitus, the opening of her vagina and her vaginal wall, was enlarged. He said this enlargement could have been from sexual intercourse. (R-418).

The State then called and offered Dr. James Chudy as an expert witness "from a psychological standpoint of child abuse." (R-440). Dr. Chudy stated that, based upon certain validators used in evaluating children for sexual abuse, he

had reached the conclusion that Kimberly Hooper had been sexually abused (R-448).

On cross-examination, Dr. Chudy admitted that his examination of Kimberly Hooper consisted of only one five hour session. He indicated that he had recommended that Kimberly return for further consultation and therapy, but that the Department of Human Resources did not make another appointment after they received his initial evaluation. Dr. Chudy identified a letter from Dr. Roy Barnes, which he had in his files, stating that in Dr. Barnes opinion, the Petitioner "was not a threat to his daughter from a sexual abuse standpoint" (R-453). Dr. Chudy also stated that one psychologist could reach a determination of sexual abuse when another psychologist, based on the same interview, would decide that there had

been no sexual abuse (R-465).

Amelia Davis was called as the State's final witness. She testified that she had worked for the Escambia County Department of Human Resources and investigated Kimberly Hooper's complaint of sexual abuse against her father. Mrs. Davis stated that she first interviewed Kimberly Hooper on January 15, 1985 and that Kimberly Hooper first recanted her story on February 19, 1985.

Mrs. Davis described the process by which she, Captain Hagan, Doug Mitchell and Bill Rhegness, based on the statements of Kimberly Hooper, identified State's Exhibits 1A, 2A and 3A as the tapes viewed by Kimberly Hooper (R-480).

On cross-examination, Mrs. Davis initially denied having problems with Kimberly Hooper telling lies but was

impeached with a prior statement she had given in Juvenile Court:

> Q. Do you remember this answer by you, please ma'am: "It is not lying about her story but it is lying to her mother about me and lying to me about her mother. It is that kind of thing. Not so much about the sexual abuse but about the things that she tells her mother about me and she tells me about her mother. They are just not the same thing." Do you recall making that statement under your oath?
>
> A. I could have made that. (R-493-494).

Also, Mrs. Davis testified that she had investigated a prior complaint of sexual abuse, containing similar allegations to those made by Kimberly Hooper against her father, by Ms. Hooper against a Mr. A. R. Gunn which turned out to be false (R-498). During cross-examination Mrs. Davis insisted that she always told Kimberly to tell only the truth but she admitted that, Kimberly knew it was her opinion that Kimberly's

initial accusations against the Petitioner were truth (R-516-517).

Further, Mrs. Davis described numerous emotional problems including nightmares, eating disorders and lying, that Kimberly had experienced since she had been removed from her parent's home (R-522-523). However she testified that Kimberly, at age 13, would be more susceptible to influence that at age 17.

After Mrs. Davis testified, the State recalled Michelle Lucas, Stephanie Milam and Tyra Thomley to complete the predicate for their earlier testimony concerning Kimberly's rape complaints. The Petitioner objected to this procedure due to the effect of these witnesses testifying twice on the jury and because it was shown that after their original testimony they had entered the courtroom and stayed for an

undetermined length of time. Ultimately, Stephanie Milam had to be recalled a second time for this same purpose.

After the State rested, the Petitioner moved for a Judgment of Acquittal based on the failure of the State to prove a prima facie case of second degree rape or to properly prove venue (R-573-579). The trial court denied this motion (R-582).

The Petitioner called 22 witnesses to testify as to his good character and his excellent reputation in the community for truth and veracity. One of these character witnesses, Adam Bailey, testified that sometime in 1984 he had been with Rusty Miller at Kimberly Hooper's house when her parents were not there (R-592). Jimmy Dukes, another character witness, stated that he had

overheard an argument in the Hooper household concerning Kimberly being alone with boys at their home while her parents were away (R-730).

Virginia Hooper, Petitioner's wife, was called and testified as to the pressure placed upon her by Amelia Davis and Doug Mitchell of the Department of Human Resources to believe the accusations against the Petitioner. This included cancelling and delaying her visitation with Kimberly and at R-613:

> A. Uh, every time we visited instead of just talking about the weather or Kimberly's school, she made Kimberly tell me in detail how my husband was suppose to have molested my daughter, or our daughter.

and on page R-617,

> Q. (MR. HARDEN): We were talking about a nasty remark that you considered made by Mr. Rebarchek.
>
> A. Yes, sir.
>
> He accused Kimberly's whole family

of deserting her and that I wasn't a very fit mother to have not stood by my daughter and to have chosen my husband instead.

Q. What exactly did they want you to do; do you know?

A. Yes, sir. I was supposed to go over to their side and help them convict my husband, even though they had been told on numerous occasions by my daughter that he had not done anything.

Q. Mrs. Hooper when you were having these visitations, I think you described were some four or five in number, prior to the trial was there ever any discussion by Kimberly in the presence of Amelia Davis about the fact she was trying to recant her story?

A. Yes, sir.

Q. And do you recall maybe what she said or what Amelia Davis said?

A. Kimberly testified that it was, I mean, I'm sorry, she just said that it was a big mistake and that it hadn't happened. And then Amelia Davis said, "No, you're just saying that because that's what your mother wants you to say. (R-617)

Mrs. Hooper further testified that Kimberly had experienced emotional

problems as early as age three (R-618-619) and that to help control her emotional problems Kimberly was prescribed the drug Ritalin (R-622). Mrs. Hooper stated that she had received reports of Kimberly fantasizing after she had been removed from her custody by the Department of Human Resources.

John Hooper, Jr., Kimberly's brother, testified that he had seen Rusty Miller at his home in Atmore with Kimberly on occasion when his parents were absent. Also, he denied that his father had ever locked him out of the family home although Kimberly had done so occasionally (R-647-646).

The Petitioner, John Edward Hooper, denied that he had ever sexually abused his daughter (R-658). He further denied that he had made Stephanie Milam watch an X-rated film (R-658); that he had

ever admitted raping his daughter while talking with her on the phone (R-659); or that he had showed his daughter X-rated films prior to having sexual intercourse with her (R-663).

During cross-examination the Petitioner stated that while he had taken certain X-rated tapes to his home he did not realize that they were pornographic until he had watched part of one of them. At that point he stopped watching it and returned all of them as soon as possible.

The Petitioner, during cross-examination, continued to deny that he had ever sexually molested his daughter in any way (R-686).

The Petitioner rested and renewed his Motion for Judgment of Acquittal. The trial court again denied this motion. During the Court's charge, Judge Byrne

charged the jury as follows on page R-751:

> Now, the prior testimony of Kimberly Sue Hooper given in September of 1985 while she was under oath and subject to cross examination can be used by you as substantive evidence of the facts stated by her during her prior testimony to prove or disprove the innocence or guilt of the Defendant John Edward Hooper of the offenses alleged in the indictment. Only the prior testimony of Kimberly Sue Hooper can be considered by you as substantive evidence. (Emphasis added).
>
> Now, the prior testimony, as I have already mentioned, of all the other witnesses or of all the witnesses can be used for impeachment purposes, that is, a witness's prior testimony can be used to show that prior to this trial the witness made statements that are inconsistent with the testimony given in this trial and such prior inconsistent statements can be used by you to judge the credibility of that witness.

The Appellant requested that the Court recharge the jury at pages R-758-759 but the Court refused. The Appellant then moved for a mistrial which was denied by the Court.

After he completed his charge, the trial court finally ruled that due to the inflammatory nature of their contents State's Exhibits 1A, 2A and 3A would not be admitted or taken by the jury to the jury room during deliberation (R-760). The jury began deliberating at 4:50 on September 16 and returned a verdict of guilty to both charges at 6:30.

REASONS FOR GRANTING THE WRIT

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." Davis v. Alaska, 415 US 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Although this right is limited by "other legitimate interest in the criminal trial process ...its denial or significant diminunition calls into question the ultimate "integrity of the fact finding process" and requires that the competing interest be closely examined." Chambers v. Mississippi, 410 US 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). As a result "a criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 US 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

ARGUMENT

I.

> Have you been or has any member of your famly ever been the victim of rape or any sexual abuse?

This question was posed by the trial court to a jury venire of some forty (40) citizens of Escambia County, Alabama on page R-58 of the Clerk's Record . Two of the potential jurors answered this question in the affirmative and were dismissed by the Court for cause because he did not feel they could give the Petititioner a fair and impartial trial.

Later in the week, the Petitioner made an offer of proof to show that Stephanie Milam and Michelle Lucas, two of the State's corroborating witnesses to the

rape complaint made by Kimberly Hooper, were biased against the Petitioner, who was accused of sexually abusing his daughter, as a result of their own experiences of being sexually abused. The basis of this offer of proof is stated on pages R-346-347 of the record as follows:

> THE COURT: Let me make sure I understand your objection or your offer of proof or whatever.
>
> You want to show the bias of these witnesses toward the defendant based upon their prior accuasations or occurrences of abuse; is that right?
>
> MR. OWENS: That's, I think, in substance.
>
> MR. HARDEN: Also, Judge, there's some conflict in the testimony of Stephanie Milam or Miland, whichever the case might be, there's some conflict in her testimony and in the testimony of Kimberly Hooper. Somebody has told a story. And we offer it, further, to show motive on the part of this little Milam to give false testimony. The jury has got to decide who is giving false testimony.
>
> The Court did not deny the

Petitioner's offer of proof but stated as follows on pages R-349-350 of the record:

> THE COURT: Okay. I don't feel that the testimony that you all would elicit from these witnesses about these other occurrences would show bias toward this defendant.
>
> I think, reviewing the cases in McElroy, there's got to be more of a direct link to show bias toward this defendant, like something that occurrred between them. I don't think the motive gets it either. So, for that reason, I guess, I'm denying your motion or ...

and on pages R-351-353:

> THE COURT: --but I'm just saying if they did testify as you stated that I would still not allow their testimony to come in to show bias against this defendant.
>
> I want to make it clear I'm not saying you can't call them in here and put them on the stand and ask them, elicit from them the answers that you say they would give. Nobody has contested that, really.
>
> THE COURT: I am assuming that what you are saying is correct, if she would testify to that, and even so it's my opinion that that would not be sufficient to show a bias toward this defendant.

That the right to cross-examination of adverse witnesses is a fundamental constitutional right is beyond question. The Supreme Court of the United States in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974(stated that "the Sixth Amendement to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him" and that this right extended to both State and Federal proceedings. Davis,supra, 415 U.S. at 315, 39 L.Ed.2d at 353. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The Court in Davis,supra discussed the meaning of the defendant's right to confront his accusers:

> "Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is

the right of cross-examination." Douglas v. Alabama, 380 U.S. 415-418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Professor Wigmore stated:

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witnesses, or being gazed upon by him, but for the purpose of cross-examination, which cannot be had, except by the direct and personal putting of questions and obtaining immediate answers." (Emphasis in original) 5 J.Wigmore, Evidence Section 1395, p. 123 (3rd Ed. 1940).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested subject always to the broad discretion of a trial judge to preclude repetitive and unduly harrasing interrogation, the cross-examiner is not only permitted to delve into the witness's story to test the witness' preception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. Davis, supra, 415 U.S. at 315,316.

The Petitioner contends that the issues that he attempted to bring to the

attention of the jury were very relevant and critical to his defense in this matter: the bias of the witnesses Stephanie Milam and Michelle Lucas and the motivation of Kimberly Hooper in revealing to Miss Milam and Miss Lucas that she had been the victim of sexual abuse. During cross-examination by the State, Kimberly Hooper testified as follows from page R-201 of the record:

> Q. Did you ever at any time prior to September 16, 1985, when you testified right here, did you ever watch those films with Stephanie Milam and your father at your house in Atmore, Alabama?
>
> A. No, sir.
>
> Q. At any time ever?
>
> A. Stephanie has never been in my house.

and on page R-202:

> Q. --did you ever have an occasion to watch on the satellite dish with Stephanie Milam and your father X-rated, pornographic TV shows?

A. No, sir.

Thereafter, Stephanie Milam was questioned and testified as follows from page R-310 of the record:

Q. How did you know Kimberly?

A. We were best friends.

Q. Did you all do things together?

A. Yes, we did.

Q. Could you tell the jury what kind of things you did together?

A. We spent the night with each other. We rode the bus. We had classes together. We did practically everything together.

Miss Milam again contradicted the testimony of Kimberly Hooper on page R-318 of the record as follows:

Q. Have you ever watched sexually explicit television programming in Kimberly's house?

A. Once.

Q. Was the defendant present? Was Mr. Hooper present?

A. Yes.

and on page R-321:

Q. (MRS. POE): Did you while watching sexually--Did you watch sexually explicit programming in Kimberly's home?

A. Yes.

Q. Was Mr. Hooper present at that time?

A. Yes.

Q. Did you attempt to leave?

A. Yes.

Q. Did any one say anything? Did he say anything to you?

MR. HARDEN: Object to who "he" is. It's not clear.

Q. (MRS. POE): Mr. Hooper. Did Mr. Hooper say anything to you at that point?

A. Yes.

Q. What did Mr. Hooper say to you?

A. Don't go, don't leave, stay, you know.

Because Kimberly Hooper, the prosecuting witness, was attempting to recant her story about her father, the Petitioner, molesting her, the most

important issue involved in this case for the jury to decide was the credibility of Kimberly Hooper. Miss Milam was called by the State to verify that Miss Hooper had made rape allegations. This she did. Testimony about Kimberly Hooper making the rape allegations would not have been damaging since Miss Hooper admitted that she had made the allegations, only that they were false. However, Miss Milam went further and contradicted Miss Hooper's testimony in the above manner. Petitioner contends that this created a situation where the credibility of both Miss Hooper and Miss Milam was an issue so that he should have been able to show the potential bias of Miss Milam.

In Davis, supra, the defendant sought to show the existence of potential bias and prejudice of a prosecution witness

causing him to falsely identify the defendant. The witness, Green, had a juvenile record and was on probation in juvenile court. The defendant sought to show this through cross-examination on the theory that the witness was more susceptible to influence by the State, but was prevented from doing so by a protective order. The Supreme Court further analyzed the confrontation clause,

> "a more particular attack on the witness' credibility is affected by means of cross-examination directed toward reversing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony.'" 3A J. Wigmore Evidence, Section 940, p. 775 (Chadbourne revised 1970) Davis, supra 415 U.S. at 316.

The Supreme Court reversed Davis' conviction concluding that the jury was

> "entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act.'" Davis, supra 415 U.S. at 317.

The Court stated that the State's interest in preserving the anonymity of a juvenile offender was overridden by the right of confrontation.

In Olden v. Kentucky ____ U.S. ____, 109 S.Ct. 480, ____ L.Ed.2d ____ (1988) the defendant had been restricted from cross-examining a key prosecution witness about her interracial relationshiop because of the danger such would prejudice the jury against her. The Supreme Court in Olden, supra stated that:

> "a criminal defendant states a violation of the confrontation clause by showing that he was

> prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'". Olden, supra 109 S.Ct. at 483 (quoting Davis, supra 415 U.S. at 318, 94 S.Ct. at 1111).

In reversing Olden's conviction, the Supreme Court held that:

> "while a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant" . . . speculation as to the effect of "jurors racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony." Olden, supra 109 S.Ct. at 483.

The Court thereafter mad a determination as to whether the error was harmless in accordance with the standard enunciated in Chapman v.California, 386 U.S. 18, 18

S.Ct. 824, 17 L.Ed.2d 705 (1967) and applied to confrontation clause errors by the Supreme Court in Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In Delaware v. Van Arsdall, supra the trial court prevented the accused from cross-examining a witness concerning the State's dismissal of his pending public drunkeness charge as a basis for determining his bias toward the State. The State acknowledged that the charge had been dismissed but the trial court, nevertheless, prohibited all inquiry into the possibility that the witness would be biased as a result. The Supreme Court reversed stating:

> "[b]y thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the Court's ruling violated

respondent's right secured by the confrontation clause." Van Arsdall, supra 106 S.Ct. at 1435.

However, the Court also held that the denial of a defendant's right to impeach a witness for bias is subject to harmless-error analysis by determining whether "the error was harmless beyond a reasonable doubt." Van Arsdall, supra 475 U.S. at 684.

The Alabama Court of Criminal Appeals in discussing the limits of cross-examination, in Page v. State, 487 So.2d 999 (Ala.Crim.App. 1986), stated "it is always permissible to cross-examine a witness to ascertain his interest, bias, prejudice, or partiality concerning matters about which he is testifying. Generally, anything which tends to show bias, unfriendliness, enmity, or inclines the witness to swear against the party is admissible". Page, at

1003. Although the trial court has discretion in this area, the Court of Criminal Appeals in Proctor v. State, 331 So.2d 828 (Ala.Crim.App.) 1976) indicated that "where the witness' testimony is of major importance and is strongly adverse to the party against whom he has testified, the usual discretion of a trial court has a narrow range, and it generally is required to allow proof of any important fact indicating bias of the witness". Proctor, at 830.

The Court of Criminal Appeals in Moody v. State, 495 So.2d 104 (Ala.Crim.App. 1986), further defined the discretion of the trial judge to limit the cross-examination of a witness as to bias. The Court quoted the United States Supreme Court that the trial court's "discretion must be exercised with due

regard for the defendant's constitutional rights. Specifically, it is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a "subject matter relevant to the witness' credibility", such as the witness' possible motive for testifying falsely". Moody, supra, at 106. (Quoting Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The Court, in Moody, supra reversed the defendant's conviction because the trial court had denied defense counsel the opportunity to cross-examine a prosecution witness to determine if the fact that she was under indictment would prejudice her against the defendant. The Court found that "certainly the fear of prosecution . . . by the State might

cause her to testify favorably on behalf of the State." Moody, at 106.

In Baker v. State, 568 So.2d 374 (Ala.Crim.App. 1990) a key State's witness was under investigation for possession of drugs. The defense attorney attempted to cross-examine him concerning any possible bias because of the fears he had about being prosecuted, but was prevented by the trial court. The Court of Criminal Appeals reversed holding the witness' belief went to his state of mind and that "the defense attorneys should have been permitted to disclose his fears and any possible bias." Baker, supra, at 377 (Emphasis Ours).

In the current case, the Alabama Court of Criminal Appeals, in its decision of March 29, 1991, agreed that the trial court had improperly restricted

Petitioner's cross-examination of the witness, Stephanie Milam, holding that the trial court erred "at least with regard to S. M. in not allowing defense counsel to cross-examine (her) about whether she had been sexually abused." However, the Court of Criminal Appeals, relying on Van Arsdall, ruled that the error was harmless "because the fact that the prosecutrix made complaints to her two friends was corroborated by other witnesses, and because other witnesses testified to the fact that the prosecutrix had made complaints to them".

In reaching this decision, the Court of Criminal Appeals cited the following factors enunciated by the United States Supreme Court in Van Arsdall, supra to be used by reviewing courts in determining whether a trial court's

restriction of cross-examination was harmless error:

1. The importance of the witness' testimony;

2. Whether the testimony was cumulative;

3. The presence or absence of evidence corroborating or contradicting the testimony;

4. The extent of the cross-examination otherwise permitted; and

5. The overall strength of the prosecution's case.

In Van Arsdall, supra the Supreme Court remanded the case for the Delaware Supreme Court to determine, based on the above factors, whether the error was harmless beyond a reasonable doubt. However, in Olden, supra the Supreme Court applied these factors to the facts before it and found:

1. That the excluded testimony was crucial to the State's case.
2. That the excluded testimony was directly contradicted by the Petitioner as in this case and another witness.

3. That the excluded testimony was corroborated only by that of another witness which was likewise questionable.
4. That the State's case was "far from overwhelming".

Therefore the Court found it "impossible to conclude 'beyond a reasonable doubt' that the restriction on Petitioner's right to confrontation was harmless". Olden, supra 109 S.Ct.484.

In the present case, while the Petitioner would be reluctant to concede that the ability to cross-examine a prosecution witness and thereby weaken the State's case against a criminal defendant would not be of any value, it is obvious that the Court of Criminal Appeals did not fully examine all of the facts in making its decision. Although, Stephanie Milam may have been just one of several witnesses to corroborate

Kimberly Hooper's rape complaints, she also gave further testimony concerning her friendship with Ms. Hooper and of the incident at the Hooper house where she alleged that the Petitioner forced her and Kimberly to watch a sexually explicit movie.

The Petitioner would argue that the application of the factors suggested by the United States Supreme Court in Van Arsdall, supra and Olden, supra to these additional allegations by Stephanie Milam, creates more than a reasonable doubt that the trial court's error contributed to the jury's verdict.

1. The allegation by Ms. Milam that the Petitioner forced her to watch a sexually explicit movie was the only direct testimony from any witness, other than Kimberly Hooper, that the Petitioner was guilty of some

wrongdoing.

2. The testimony by Ms. Milam was totally uncorroborated.

3. Ms. Milam had testified at the prior trial of the Petitioner and failed to mention the incident involving the sexually explicit movie.

4. Both the Petitioner and Kimberly Hooper contradicted Ms. Milam's testimony concerning the sexually explicit movie.

5. The Petitioner's cross-examination of Ms. Milam concerning the incident that was permitted by the trial court created a jury question as to her credibility which made the trial court's restriction of Petitioner's attempts to show Ms. Milam's bias all the more critical.

6. Finally, the State's case against the Petitioner consisted primarily of

the impeached prior testimony of numerous witnesses who stated that Kimberly Hooper had made rape complaints to them, the opinion of Dr. Jimmy Adkisson that Kimberly Hooper had been sexually active and the opinion of Dr. James Chudy, a psychologist, that Ms.Hooper had some of the characteristics of a child who had been sexually abused. Once again, the only direct testimony linking the Petitioner with any wrongdoing was that of Kimberly Hooper, who was recanting her allegations, and of the witness, Stephanie Milam, concerning the incident involving the X-rated movie at the Hooper house.

Therefore, the Petitioner contends that the trial court's abuse of discretion in limiting the Petitioner's cross-examination of State's witnesses,

Stephanie Milam and Michelle Lucas, after admitting that the Petitioner would be able to show a history of sexual abuse before it could be determined if the traumatizing effects of sexual abuse had caused them to feel some bias toward the Petitioner who was accused of rape, denied him his rights under the confrontation clause contained in the Sixth Amendment and applied to the states by the Fourteenth Amendment.

Further, based on the foregoing, the Petitioner argues that it would be impossible for this Court, as it was for the Court in Olden, supra "to conclude 'beyond a reasonable doubt' that the restriction on Petitioner's right to confrontation was harmless". Olden, supra 109 S.Ct. at 484.

Petitioner has previously asked this Court to review his conviction and the

ruling by the Alabama Supreme Court reversing the Alabama Court of Criminal Appeals on the issue of the use of Kimberly Hooper's prior testimony as substantive evidence when the established law at the time of Petitioner's trial was that such testimony could not be substantive evidence. Previously, the Petitioner asked this Court to disregard the fact that he was charged with the rape of his daughter and look merely at the Constitutional questions involved. The Petitioner wishes to caution the Court once again.

The Petitioner agrees with this Court that "child abuse is a problem of disturbing proportions in today's society," and that the lack of witnesses other than the victim creates the biggest obstacle to the detection of

child abuse. See Coy v. Iowa ____U.S.____, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988), Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987).

Petitioner further realizes that a ruling by this Court in his favor could adversely affect the willingness of victims of child abuse to come forward when they are witnesses in other cases and risk extensive and humiliating cross-examination by the defendant.

The Petitioner is asking this Court to look at the issues as it did in both Coy, supra where it held that the placement of a screen between the defendant and child sexual abuse victims violated the defendant's rights under the confrontation clause and Ritchie, supra where it permitted the review of a Department of Children and Youth

Services file in the defendant's trial for the rape of a minor, when it weighed measures for the protection of minor victims of abuse against the rights of defendants under the confrontation clause and ruled that the Constitutional concerns prevailed. The Petitioner is merely asking that this Court see that his Constitutional rights should prevail in this case and that this Court should grant this petition of Writ of Certiorari and reverse his conviction in the Circuit Court of Escambia County.

CONCLUSION

The petition for Writ of Certiorari should be granted and the Petitioner's

conviction in the Circuit Court of Escambia County, Alabama, should be reversed and remanded for a new trial where his Constitutional rights under the confrontation clause will be protected.

The Petitioner is respectfully requesting that this Court recognize that his rights of confrontation as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were denied him by the trial court when it restricted his cross-examination of the State's witnesses, Michelle Lucas and Stephanie Milam.

DATED at Evergreen, Alabama, this the ____ day of November, 1991.

Respectfully submitted,

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